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CHARLES ELMORE CROPLEY
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In the

Supreme Court of the United States

No. 252 October Term, 1949

Lafayette M. Gray (also known as L. M. Gray),
petitioner,

v.

United States of America,
respondent

PETITION

for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

and

BRIEF in Support Thereof

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In the

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No. October Term, 1949.

Lafayette M. Gray, (also known as L. M. Gray),
petitioner,
v.
United States of America,
respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Lafayette M. Gray, respectfully prays for a writ of certiorari

to review the decision, order and judgment (R.p. 489) of the United States Court of Appeals for the Eighth Circuit, made and entered in the above-entitled case on June 6, 1949;

and/or

to review *that part* of the decision (R.pp. 448-460) and judgment (R.p. 460) of said Court dated April 18, 1949 which was *entered on June 6, 1949, nunc pro tunc;* namely, the June 6, 1949 modification (R.p 489) of the April 18, 1949 judgment (R.p. 460) striking (on June 6, 1949) the words: *"discharge the accused"* (from that Court's original opinion

and judgment of April 18, 1949) and substituting in place thereof (on June 6, 1949) the words: "*grant a new trial*".*

On June 15, 1949 the United States Court of Appeals for the Eighth Circuit entered an Order (R.pp. 489, 490) herein granting petitioner an extension to and including July 6, 1949, within which to file a petition for rehearing. Such petition was filed on July 5, 1949 (R.pp. 491-510) and was denied on July 14, 1949 (R.p. 511).

A certified transcript of the record in the case, including the proceedings in the Court of Appeals, is furnished herewith, in acordance with Rule 38 of this Court.

Summary and Short Statement of the Matter Involved

The present suit is a criminal action brought in the United States District Court for the District of Minnesota, against petitioner, by Information filed July 21, 1947, charging petitioner, in four separate Counts, with the violation of the Federal Food, Drug and Cosmetic Act (enacted June 25, 1938) being Chapter 9 of Title 21 of the United States Code (21 U.S.C. 352 [a]. [e] & [f]).

On December 18, 1947, defendant filed a motion (R.pp. 6, 7) to dismiss the action, on the ground that in each Count of the Information the defendant is charged with more than one offense.

On January 24, 1948, the District Court filed its order (R.pp. 8, 9) denying, as to each of the four Counts, defendant's motion to dismiss the action; the District Court's pre-trial (and pre-arraignment) holding being that the Information was a valid one.

(On appeal, the Court of Appeals concurred in the District Court's pre-trial holding, and likewise held that the Information was a valid one; R.p. 451, lines 21 to 32.)

* NOTE: All emphasis herein supplied by petitioner's counsel unless otherwise indicated.

On March 8, 1948, defendant was arraigned and entered a plea of "Not Guilty" (R.p. 10). Defendant was thereupon tried, on said Information (R.pp. 1-6), before the trial court and a jury; the trial commencing on March 10, 1948 (R.p. 12) and ending on March 27, 1948 (R.p. 363.

The trial judge dismissed Count IV of the Information during the trial (R.p. 384).

At the close of all the evidence, defendant moved for judgment of acquittal on the grounds stated in the written motion filed at that time (R.pp. 318, 364-366). This motion was denied (R.p. 318).

The trial judge did *not* submit to the jury the usual forms of verdict requiring the jury to find defendant "guilty" or "not guilty" *only once* as to each of Counts I, II and III (the only Counts submitted to the Jury: R.pp. 11, 12).

On the contrary, the trial judge submitted to the jury three forms of verdicts which required it to find defendant "not guilty" or "guilty" three times as to Count I, twice as to Count II and twice as to Count III, instead of only once as to each count (R.pp. 11, 12, 347-349).

Immediately upon the completion of the trial judge's charge to the jury, the defendant took specific and timely exception to the action of the trial court in submitting verdict forms to the jury requiring multiple responses to each count (R.p. 350, and see Court of Appeals opinion at R.p. 455, lines 5 *et seq.*).

(The fact that the first form of verdict [R.pp. 347-8] as to Count I and the third form of verdict [R.pp. 348-9] as to Count III required the jury, inter alia, to bring in a verdict of "guilty" or "not guilty" of a false and misleading "**label**"[1], instead of false and misleading "**labeling**"[2], i. e. as contained in defend-

[1] as defined by sub-division "k" of Section 321 of Title 21 of the United States Code; which false and misleading "**label**" was *not* charged in the Information.

[2] as defined by sub-division "m" of Section 321 of Title 21 of the United States Code.

ant's letters[1], was not noticed by defendant's counsel[2] upon the mere hearing of the forms of the proposed verdicts read by the trial judge to the jury [R.pp. 347-349 and R.pp. 506-7]).

Notwithstanding defendant's exceptions (R.p. 350), the trial judge submitted said multiple forms of verdicts to the jury.

After the jury had been out for 27½ hours, namely, from 11:30 a. m on March 26, 1948 (R.p. 353) to 3 p. m. on March 27, 1948 (R.p. 363), it returned the three verdict-forms; and the returned verdicts found defendant "**not guilty**" **five times** and "guilty" twice, namely:

(1) "*not guilty*"[3] *twice* and "guilty"[4] once, as to Count I
(2) "*not guilty*"[3] *twice,* as to Count II, and
(3) "*not guilty*"[3] *once* and "guilty"[4] once, as to Count III.

On April 1, 1948, defendant (under Rule 29 of the Federal Rules of Criminal Proceedure) filed his written motion (R.pp. 366-9) for judgment of acquittal on the grounds stated therein. This motion, as amended (R.pp. 370-1), was heard by the trial court on May 3, 1948 (R.p. 371) and was denied with an opinion and by an order filed May 11, 1948 (R.pp. 372-380).

Judgment, adjudging defendant guilty and convicted on Counts I and III of the Information, and sentencing him, was entered by the District Court on June 1, 1948 (R.pp. 380, 381).

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[1] charged in the Information.

[2] and, presumably, was likewise *not* noticed by the government's attorney nor by the trial judge even though the trial judge presumably gave his oral reading of the verdict-forms directly from the typewritten verdict-forms which were thereafter handed to the jury.

[3] i. e. "not guilty" of failing to put the common name of the drug upon its "label" in Counts and Verdicts I, II and III and "not guilty" of "inadequate directions for use" in Counts and Verdicts I and II.

[4] i. e. "guilty" of a false and misleading "label"; an offense not charged in the Information.

On June 10, 1948 defendant appealed to the United States Court of Appeals for the Eighth Circuit from said judgment (R.pp. 382, 383) on the grounds, inter alia, that

(a) the judgment entered by the trial court was erroneous because it adjudged defendant guilty only of an offense with which he was *not* charged in any of the Counts of the Information, and

(b) the three multiple forms of separate verdicts required or permitted the jury to find defendant "guilty" or "not guilty" three times as to Count I, twice as to Count II and twice as to Count III of the Information*.

On his appeal to the Court of Appeals, defendant prayed for reversal of the judgment of the District Court as to Counts I and III of the Information; and that defendant be granted judgment of acquittal, or that the action be dismissed in accordance with defendant's motion filed December 18, 1947 (R.p. 6), and that he be discharged. In his brief filed in the Court of Appeals on December 24, 1948, under the heading "Relief Prayed For", the defendant stated:

> "On this appeal, appellant prays for reversal of the judgment of the lower court as to Counts I and III of the Information; and that appellant be granted judgment of acquittal, or that the action be dismissed in accordance with appellant's motion filed December 18, 1947 (R.pp. 6, 7), and that he be discharged". (R.p. 499);

and concluded his brief as follows:

> "For the reasons above stated, it is respectfully submitted that the judgment of the lower court should

* whereas on defendant's motion (R.p. 6) to dismiss the action, filed prior to defendant's plea, on the ground that in each Count of the Information defendant is charged with more than one offense, the District Court denied (R.p. 9, lines 17 & 18) the motion and ruled that each Count charged only one offense. On appeal, the Court of Appeals concurred in this ruling (R.p. 451, fourth line from bottom of page).

be reversed; that the defendant is entitled to judgment of acquittal or to have the action dismissed in accordance with his motion for dismissal which was denied by the lower court and, in either event, that the defendant is entitled to be discharged.

"In taking this appeal, the *defendant does not waive and expressly reserves his right to not again be tried or put in jeopardy on or for any of the charges on which he was once tried and found 'not guilty' by the jury or on which the verdicts of the jury were silent.*" (R.p. 499).

On April 18, 1949, the Court of Appeals handed down its opinion (R.pp. 448-460) reported* at 174 F.2d 919, and entered its judgment (R.p. 460) *reversing* the judgment of the District Court on *each* of the grounds ("a" and "b") set out on page 5 hereof, and remanded to the District Court with directions to set aside the judgment and *discharge the accused* (R.p. 460). In its opinion, the Court of Appeals said:

"• • • there was no verdict of guilty of false labeling within the charge of the information, the onus of the outcome may not be shifted to the appellant. *He was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges* and he is therefore entitled to have the judgment against him avoided.

Reversed and remanded with direction to set aside the judgment and discharge the accused." (R.p. 459, line 34 to p. 460, line 5).

On May 23, 1949 the government filed a Petition for Re-Argument (R.pp. 461-486) accompanied by the assistant United States attorney's "Affidavit for Correction of Record" (R.pp. 487-8).

* the Opinion, as reported at 174 F. 2d 919, is not as handed down on April 18, 1949, but is, instead, as modified by the Order (R.p. 489) of June 6, 1949.

Because of the provisions of Rule 15(a) of the United States Court of Appeals for the Eighth Circuit, providing that "no response or opposition to such petition is permissible unless specifically requested by the Court", the defendant made no response or opposition to the government's petition for reargument, no response or opposition having been requested by the Court of Appeals (R.p. 492).

On June 6, 1949, the Court of Appeals entered its order (R.p. 489) denying the government's petition for reargument, but further ordering that its original Opinion (R.p. 460) filed on April 18, 1949, be modified by striking therefrom the last sentence reading:

> "Reversed and remanded with direction to set aside the judgment and *discharge the accused*"

and substituting therefor the folowing:

> "Reversed and remanded with directions to set aside the judgment and *grant a new trial*",

and further ordering that "The judgment of this Court entered in pursuance of the opinion filed April 18, 1949, is corrected accordingly now as of then." (R.p. 489).

On July 5, 1949, defendant filed his timely* Petition for Rehearing (R.pp. 491-510) in respect to the Court of Appeals' decision (of June 6, 1949) not to discharge the defendant but instead to grant a new trial, which decision was contrary to that Court's original decision (R.pp. 448-460) of April 18, 1949 that defendant be discharged (R.p. 460). This petition was denied on July 14, 1949 (R.p. 521).

Jurisdiction.

This Court's jurisdiction is invoked under Section 1254 (1) of Title 28 of the United States Code and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

The judgment (R.p. 460 and R.p. 489) of the Court of Appeals, which petitioner seeks to have reviewed, was

* see foregoing page 2.

made and entered on June 6, 1949[1], and petitioner's timely (R.pp. 489, 490) petition for re-hearing (R.pp. 491-510) with respect to said judgment of June 6, 1949 was denied on July 14, 1949 (R.p. 511).

The present petition for writ of certiorari is timely under Rule 37 (b)(2) of the Federal Rules of Criminal Procedure[2] in view of petitioner's timely (R.pp. 489, 490) petition for rehearing (R.pp. 491-510) filed in the Court of Appeals on July 5, 1949 (R.p. 510) in respect to the modifying order (R.p. 489) and final judgment of June 6, 1949, and in view of the established rule that the time within which a petition for writ of certiorari may be filed to review a decision and judgment of a United States Court of Appeals, does not begin to run until the denial by such United States Court of Appeals of a timely petition for re-hearing in respect to its decision for the review of which certiorari is sought:

Craig v. *United States,* 298 U.S. 637 (80 L.Ed. 1371);
Weinblatt v. *United States,* 298 U.S. 637 (80 L.Ed. 1371);
Citizen's Bank of Michigan City v. *Opperman,* 249 U.S. 448; 450 (63 L.Ed. 701, 702);
Chicago Great Western Railroad Co. v. *Bascham,* 249 U.S. 164, 166-7 (63 L.Ed. 534, 535-6);
United States v. *Seminole Nation,* 299 U.S. 417, 421 (81 L.Ed. 316, 318);
Ekberg v. *United States,* 167 F.2d. 380, 383 (CCA-1);
Chin Gum v. *United States,* 150 F.2d. 765, 766 (CCA-1).

The United States Court of Appeals for the Eighth Circuit has stayed its mandate, by its order entered on

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[1] which is the date of entry of the modifying order (R.p. 489)and final judgment of the Court of Appeals by which it modified its earlier judgment (R.p. 460) of April 18, 1949, which earlier judgment (as made and entered on April 18, 1949 and prior to such modification thereof as was made and entered on June 6, 1949) was entirely satisfactory to petitioner.

[2] Rule 37 (b-2) of the Rules of Criminal Procedure provides, inter alia: "Petition for writ of certiorari may be made within 30 days after entry of judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment."

July 19, 1949 (R.p. 511), to permit the filing of a Petition for Writ of Certiorari.

Petitioner seeks to have reviewed *only* that part of the final Judgment of the Court of Apepals entered on June 6, 1949 (R.p. 489) which fails to discharge defendant and which rescinds that Court's earlier original judgment of April 18, 1949 discharging defendant (R.p. 460), and which directs the granting of a new trial not sought by either party (instead of discharging the defendant as *correctly* directed by that Court's original judgment of April 18, 1949).

Questions Presented.

Question 1: Was not defendant entitled to be discharged in accordance with the original opinion (R.pp. 448-460) and judgment (R.p. 460) of the Court of Appeals (entered on April 18, 1949), rather than to be granted only a new trial[1] as later directed by the subsequent Order[2] of the Court of Appeals entered on June 6, 1949?

Question 2: Is not the Court of Appeals' Order[2] (R.p. 489) and Judgment[2] of June 6, 1949

(a) violative of the *double jeopardy* provision of the Fifth Amendment of the Constitution of the United States, and

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[1] Defendant did not ask the Court of Appeals for a new trial. On the contrary defendant expressly reserved his right to *not* again be tried or put in jeopardy on or for any of the charges for which he was once tried and found "not guilty" by the jury or on which the verdicts of the jury were silent (R.p. 499). The government's brief filed February 11, 1949 in the Court of Appeals likewise did *not* ask the Court of Appeals for a new trial (the government merely asked for an affirmance of the Judgment of conviction on Counts I and III).

[2] This order and judgment (made on the government's Petition for Re-Argument) while, in terms, denying the government's Petition for Re-Argument, nevertheless made a vital and far-reaching modification of the appellate court's *correct original opinion and judgment*, without affording defendant any opportunity to respond to the government's Petition for Re-Argument.

(b) in conflict with this Court's decisions in *Selvester* v. *United States*[1], 170 U. S. 262, 269; *Dealy* v. *United States*[1], 152 U. S. 539, 542; *United States* v. *Buzzo*[1], 85 U.S. 125; and *Nielsen* v. *United States*[1], 131 U. S. 176?

Question 3: May the Court of Appeals reverse[2] its correct original opinion and judgment (R.p. 460) favorable to defendant-appellant, upon plaintiff-appellee's subsequent "Petition for Re-Argument" (R.pp. 461-486)

(a) upon alleged facts advanced for the first time upon plaintiff-appellee's "Petition for Re-Argument" through an "Affidavit for Correction of Record" (R.pp. 487, 488) annexed to such "Petition for Re-Argument"; which alleged facts concededly do not appear either in the printed or typewritten Record on appeal and are concededly not supported even by the original Transcript nor by the court-reporter's stenographic notes, and which alleged facts are squarely contradicted by the printed Record on appeal (R.pp. 275, 276),

(b) without affording defendant-appellant any opportunity either to respond to plaintiff-appellee's

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[1] which decisions of this Court are to the effect that if upon a trial on a valid indictment or information, a conviction might have been had but was not, there was an implied acquittal, and the jury having been discharged without having found defendant guilty of any offense charged, the defendant must be discharged.

[2] while the appellate court's Order and Judgment of June 6, 1949, (in respect to which a Petition for Writ of Certiorari is hereby sought), in terms, denies plaintiff-appellee's "Petition for Re-Argument", it is, nevertheless, a substantial reversal of the appellate court's correct original judgment, in that it changes the original Judgment from a direction to discharge the defendant to a direction granting a new trial which was not sought by either party (which substantial reversal of the correct original Judgment, the subsequent Order of June 6, 1949 does without any change of the appellate court's original Opinion that the Judgment of conviction entered by the trial court must be vacated because it adjudges defendant guilty only of an offense not charged in the Information and that the defendant had been put in jeopardy on the charges of the several Counts of the Information and the jury had been discharged without having rendered verdicts of "guilty" responding to such charges).

"Petition for Re-Argument" or to plaintiff-appellee's "Affidavit for Correction of Record" or to be otherwise heard or have his day in court in respect to such reversal of the appellate court's own earlier correct original opinion and judgment?

Reasons Relied Upon for Allowance of Writ of Certiorari.

1. By its Order (R.p. 489) and Judgment of June 6, 1949, the Court of Appeals has decided important questions of federal and constitutional law (namely *Questions 1 and 2, above*) in a way which violates the *double jeopardy* provision of the Fifth Amendment of the Constitution of the United States and in a way which is in conflict with the following applicable decisions of this Court, and in a way which so far departs from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision, as shown by the following applicable decisions of this Court and of the Court of Appeals of the Eighth and other Circuits and of State appellate courts, in that *the Court of Appeals, in the case at bar, has directed a new trial (not sought by either party) in face of its own unaltered prior original finding, holding and decision that defendant had been in jeopardy on the charges of the several Counts of a valid Information and that the jury was discharged without having rendered verdicts of guilty responding to the several charges* (but the jury having found defendant "not guilty" *five times*):

Selvester v. *United States*, 170 U. S. 262, 269;
Dealy v. *United States*, 152 U. S. 539;
United States v. *Buzzo*, 85 U. S. 125;
Nielsen v. *United States*, 131 U. S. 176;
Gray v. *United States*, 14 F. 2d 366, 368 (CCA-8);
Commonwealth v. *Komatowski*, 347 Pa. 445, 32 Atl. (2d) 905;
Walter, et al v. *Commonwealth*, 44 Pa. 135;

Ex Parte Muse, 56 Okl. Cr. 232; 37 Pac. (2d) 317;
People v. *Arnarez,* 68 Cal. App. 645; 230 Pac. 193;
State v. *Yow,* 227 N.C. 585; 42 S.E. (2d) 661;
State v. *Ward,* 147 La. 1083; 86 So. 552.

2. The Court of Appeals has decided an important question of federal law (namely *Question* 3, above) in a way which violates the *due process* provision of the Fifth Amendment of the Constitution of the United States and in a way which is in conflict with the following applicable decisions of this Court and in a way which so far departs from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision, as shown by the following applicable decisions of this Court and several United States Courts of Appeal and District Courts, in that *the appellate court's order and judgment of June 6, 1949, in effect, reverses that Court's earlier original judgment of April 18, 1949.*

(a) upon alleged facts concededly *de hors* the record and, indeed, squarely contradicted by the record,

(b) without affording defendant-appellant (petitioner at bar) any opportunity to respond to plaintiff-appellee's "Petition for Re-Argument" and *without giving defendant-appellant* (petitioner at bar) *his day in court* with respect to such reversal of the appellate court's own earlier original judgment wholly favorable to defendant-appellant:

Rule 39 (b)(1) of the Federal Rules of Criminal Procedure;
Rule 75 (h) of the Federal Rules of Civil Procedure;
Rule 36 of the Federal Rules of Criminal Procedure;
Sibbach v. *Wilson & Co.,* 312 U. S. 1 (61 S.Ct. 422, 427);
John R. Alley & Co. v. *Federal National Bank,* 124 F. 2d. 995, 998 (CCA 10);
Nash v. *Raun,* 67 F. Supp. 212, 217 (DC WD Pa);
Dreslin v. *Phillips,* 279 Fed. 303 (App. D. C.);

Clawans v. *White*, 112 F. 2d. 189 (App. D. C.);
Century Indemnity Co. v. *Arnold*, 153 F. 2d 531 (CCA-2);
Petitions of Rudder, 159 F. 2d 695, 696 (CCA-2);
Reynolds v. *Imlay*, 118 F. 2d 53 (App. DC);
Boucher Inventions, Ltd. v. *Sola Electric Co.*, 1 F.R.D. 631 (D.C., D. of C.);
Vizen v. *Great Lakes Dredge & Dock Co.*, 11 Fed. Rules Serv. 75h-22, Case 1 (D.C. N.D. Ohio);
Daniels v. *Goldberg*, 12 Fed. Rules Serv. 60b-34, Case 1 (DC SD NY);
Heath v. *Helmick*, 173 F. 2d 156 (CA 9);
Wertz v. *National City Bank*, 115 F. 2d 65, 67 (CCA-7);
Marvin's Credit, Inc. v. *Hall*, 129 F. 2nd 57 (App. D.C.);
Moore's Federal Practice, Vol. 3 § 75.09 (page 385 of 1948 Supplement).

Conclusion.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings had in said Court of Appeals in this cause, to the end that this cause may be reviewed and determined by this Court and that the aforesaid Order and Judgment made and entered by said Court of Appeals on June 6, 1949 may be reversed and the earlier original Judgment made and entered by that court on April 18, 1949 may be reinstated as originally made and entered.

Lafayette M. Gray,
petitioner
by C. A. Taney, Jr.,
G. Aaron Youngquist,
Leonard L. Kalish,
attorneys for petitioner

The undersigned hereby certify that the foregoing petition is in their opinion well founded, and that the case is one in which the petitioner's prayer should be granted by this Court.

C. A. Taney, Jr.

G. Aaron Youngquist

Leonard L. Kalish

attorneys for petitioner

Brief in Support of Petition for Writ of Certiorari

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

(Unless otherwise indicated all emphasis herein is supplied by petitioner's counsel.)

The Opinions and Judgments of the Courts below

Opinion and Judgment of the District Court.

The District Court's Opinion of May 11, 1948, denying defendant's motion for judgment of acquittal, is reproduced on pages 372 to 380, inclusive, of the printed Record.

The District Court's judgment of conviction dated June 1, 1948 is reproduced on pages 380-1 of the printed Record.

Court of Appeals' Opinion and Judgment of April 18, 1949.

The reversing Opinion dated April 18, 1949 of the United States Court of Appeals for the 8th Circuit (174 F. 2d 919) is reproduced at pages 448 to 460, inclusive, of the printed Record. As handed down on April 18, 1949, the last line of the aforesaid Opinion (R.p. 460) concluded with the words "discharge the accused".

The line drawn through the words "discharge the accused" (R.p. 460) and the substitution of the words "grant a new trial", in the last line of the Opinion (R.p. 460) were made by that Court's modifying Order and final Judgment of June 6, 1949 (R.p. 489).

The reversing Judgment dated April 18, 1949 of the Court of Appeals is reproduced at page 460 of the printed Record. As originally made and entered on April 18, 1949, the last line of said Judgment (R.p. 460) concluded with the words "discharge the accused".

The line drawn through the words "discharge the accused" and the substitution of the words "grant a new trial" in the last line of said appellate Judgment (R.p. 460) were made by that Court's modifying Order and final Judgment of June 6, 1949 (R.p. 489).

Appellate Order and Final Judgment of June 6, 1949 (to review which, certiorari is sought)

The modifying Order and final Judgment of June 6, 1949 of the Court of Appeals is reproduced at page 489 of the printed Record.

Jurisdiction

The date of the Order and final Judgment (R.p. 489) of the United States Court of Appeals for the 8th Circuit (to be reviewed) is June 6, 1949.

Defendant-appellant's (petitioner's) timely Petition for Re-Hearing (in respect to said Order and final Judgment of June 6, 1949) was denied on July 14, 1949.

Jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

For the timeliness of the present Petition for Writ of Certiorari, see page 8 of the foregoing Petition.

Statement of the Case.

The Summary and Short Statement of the Matter Involved on pages 2 to 7, inclusive, of the foregoing Petition is believed to be an adequate Statement of the Case.

Specification of Errors.

The reasons for the allowance of the Writ of Certiorari, as set out on pages 11 to 13, inclusive, of the foregoing Petition, are believed to be an adequate Specification of Errors.

Summary of Argument.

Argument-Point 1:

a) The original Opinion and Judgment entered by the Court of Appeals on April 18, 1949, directing that defendant be discharged, were correct, and

b) that Court's modifying Order (R.p. 489) of June 6, 1949 was erroneous because a new trial was not sought by either party and represents double jeopardy to defendant because:— he was fully tried on a valid Information and the jury returned verdicts finding defendant "not guilty" *five times* and was thereafter discharged without finding defendant guilty of any offense charged in the Information.

Argument-Point 2:

The Court of Appeals (by its Order of June 6, 1949) erred in rescinding its original Judgment (entered April 18, 1949) discharging defendant, and in directing a new trial, *upon the assistant United States attorney's affidavit of alleged facts not of record and, indeed, contradicted by the Record,* without giving defendant an opportunity to respond under Rule 15(a) of that Court.

Argument.

Argument of Point 1:

Defendant Convicted Only of Offense with Which He Was Not Charged

"Label" and "Labeling".

In considering and deciding this case, the Court of Appeals properly observed (R.pp. 456-457) the distinction between the statutory definitions of the terms *"label"* and *"labeling"*. They are distinctively defined by sub-divisions (k) and (m) of Section 321 of Title 21, United States Code, as follows:

> "(k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article;
>
> . . . . . .
>
> "(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

The Information in the case at bar does *not* charge defendant with an interstate shipment bearing a *"label"* which was false or misleading. It *does* charge him, in Count I, with an interstate shipment made with an accompanying *letter* containing the statement quoted in the Information, which it is alleged was false and misleading within the meaning of 21 U. S. C. 352 (a) which provides that "A drug or device shall be deemed to be mis-branded (a) If its *labeling* is false or misleading in any particular" (R. last two lines on p. 1 and first 25 lines on p. 2). Similarly, in Count III, the Information charges defendant with an interstate shipment made with an accompanying *letter* containing the alleged false and misleading statement quoted in the Information (R.pp. 3, 4). Sending such letters is the sum total of everything false or misleading that is charged in either Count I or Count III of the Information (the only ones here involved).

As commented by the trial court in its order denying defendant's motion for judgment of acquittal (R.p. 377):

> "There was no contention that the label affixed to the carton itself contained any false and misleading statements."

Such *letters* were *"labeling"* as defined by 21 U. S. C. 321 (m); but neither of them was a *"label"* as defined by 21 U. S. C. 321 (k).

Yet, the verdicts of the jury, as to Counts I and III, found defendant "guilty" *only* of "misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, with a *label* which was false and misleading;" (R.p. 11, 12). In other words the jury found defendant "guilty" *only* of shipping his product in interstate commerce with "a display of written, printed, or graphic matter *upon the immediate container,"* an offense with which defendant was not charged in the Information and in support of which there was no evidence.

Such verdicts of guilty, and also the judgment (R.p. 380, 381) entered pursuant thereto, are not responsive to and do not cover any of the offenses charged in the Information.

Defendant is entitled to be discharged (not merely to a new trial which was *not* sought).

Defendant was fully tried on a valid information. (See Opinion of Court of Appeals filed April 18, 1949 at R.p. 451, fourth line from bottom of page, and R.p. 459).

Defendant was not found "guilty" and was not convicted of any of the charges alleged in the information.

The jury's verdicts found defendant "not guilty" *five times,* namely on two of the charges of Count I, on both charges of Count II and on one of the charges of Count III of the information.

The jury found him "guilty" (in both Counts I and III) only of "misbranding by introducing into interstate commerce a drug, to-wit, Powdr-X, with a *label* which was false and misleading," an offense with which defendant was not charged in the information. The trial court entered judgment in accordance with such verdicts. (See Opinion of Court of Appeals filed April 18, 1949 at R.pp. 449-460).

The verdicts of the jury were silent as to whether the defendant was "guilty" or "not guilty" of misbranding by introducing into interstate commerce a drug with *labeling* (consisting of certain personal letters written by defendant) which was false and misleading, with which Counts I and III charged the defendant. (See Opinion of Court of Appeals filed April 18, 1949 at R.pp. 459-460).

As stated by the Court of Appeals in its original Opinion filed on April 18, 1949 (which it never modified, in this respect):

> ". . . there was no verdict of guilty of false labeling within the charge of the information, the onus of the outcome may not be shifted to the appellant. *He was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges* and he is therefore entitled to have the judgment against him avoided." (R.pp. 459-460).

The original decision and judgment of the Court of Appeals entered on April 18, 1949, by which it "Reversed and remanded with direction to set aside the judgment and *discharge the accused*" was manifestly correct because the verdicts were *silent* as to any charge that petitioner shipped his product in interstate commerce with an accompanying letter, i. e., "with *labeling*" which was false and misleading; by reason of which the verdicts were equivalent to verdicts of "Not Guilty" as to such charges. That is the effect of the decision of this Court in *Dealy* v. *United States,* 152 U. S. 539, 542 in which this court said:

> ". . . the sixteenth count was not referred to in the verdict. It may have been simply overlooked by the jury. Be that as it may, the discharge of the jury under the circumstances was doubtless equivalent to a verdict of not guilty as to that count."

In *Selvester* v. *United States,* 170 U. S. 262, 269, this Court, citing the *Dealy* case with approval, said:

> "Doubtless where a jury, although convicting as to some, are silent as to other counts in an indictment, and are discharged without the consent of the accused, as was the fact in the Dealy case, the effect of such discharge is *'equivalent to acquittal'* because, as the record affords no adequate legal cause for the discharge of the jury, *any further attempt to prosecute would amount to a second jeopardy,* as to the charge with reference to which the jury has been silent."

In the case at bar, the petitioner did not consent to the discharge of the jury, nor was his consent asked. Under the *Dealy* and *Selvester* cases, the silence of the jury as to the charges that petitioner shipped his product in interstate commerce with accompanying letters, i. e., "with *labeling*" which were false and misleading, is equivalent to acquittal on such charges.

This Court, in *Nielsen* v. *United States,* 131 U. S. 176, 33 L.Ed. 118, 122, said:

> "If a conviction might have been had, and was not, there was an implied acquittal."

In *Gray* v. *United States* (C. A. 8th), 15 F. (2d) 366, 368, the court followed this Court's decision in *Nielsen* v. *United States, supra,* and referred to the above-quoted language of this Court on the doctrine of *implied acquittal.*

Petitioner's contentions on this Point are supported by numerous other decisions cited below holding, among other things, that a verdict must be responsive to and cover the offense charged in the indictment or information, and that a verdict which is not so responsive to the offense charged, and does not find defendant "guilty" of any offense charged, is the equivalent of an acquittal and requires the discharge of the defendant.

In *United States* v. *Buzzo,* 85 U. S. 125, defendant was charged with issuing certain drafts without the same being duly stamped and with intent to evade the provisions of the Internal Revenue Act. The verdict stated that the "drafts were issued without being stamped, but it did not state that it was done with intent to evade the provisions of the Act." This Court dismissed the case, saying:

> "An imperfect verdict, or one on which no judgment can be rendered, must be set aside, and a venire de novo awarded . . . *This case must, therefore, be dismissed.*"

In *Commonwealth* v. *Komatowski,* 347 Pa. 445, 32 Atl. (2d) 905, defendant was indicted for murder; the jury returned a verdict finding defendant "guilty of murder in the third degree," a crime unknown to the law of Pennsylvania. In reversing the judgment and ordering defendant discharged, the Supreme Court of Pennsylvania said, among other things:

"The most peculiar thing about this case is the verdict, and its irregularity is so at variance with the very fundamentals of 'due process of law,' that it requires the discharge of the defendant and makes unnecessary the discussion of any other point raised. . . .

"Since the defendant has the constitutional right 'to demand the nature and cause of the accusation against him,' . . . it follows that he cannot be convicted of an offense which is not the accusation made against him or any constituent thereof. . . .

"No authority is needed to sustain the proposition that a defendant cannot be legally convicted of a crime, neither charged in the indictment, nor a necessary constituent of any crime so charged, . . ."

In the *Komatowski* case, the Supreme Court of Pennsylvania referred to the earlier case of *Walters, et al,* v. *Commonwealth,* 44 Pa. 135, in which defendants were charged with murder and voluntary manslaughter and were found guilty by the jury of only involuntary manslaughter; and the Court quoted with approval from the Walters case as follows:

"The prisoners have been acquitted by the verdict of all crimes charged in the indictment and convicted of a charge not made in or embraced by it. We will, therefore, simply reverse, *for no new trial could be ordered in such a case.*"

In *Ex Parte Muse,* 65 Okl. Cr. 232, 37 Pac. (2d) 317 (a habeas corpus proceeding) the information had charged defendants with "burglary in the second degree" and the jury found them "guilty of grand larceny." In holding that the judgment of the lower court, sentencing defendants on the verdict, was void and that defendants were entitled to be discharged, the appellate court said:

"The judgment must be based on the verdict of the jury, and the verdict of the jury must be respon-

sive to the issues joined. The verdict in this case has not been set aside. The petitioners *having been in jeopardy, they cannot again be tried on this information.*"

In *People* v. *Arnarez,* 68 Cal. App. 645, 230 Pac. 193, defendant was charged with the offense of "unlawfully and knowingly manufacturing intoxicating liquor"; and the jury's verdict found him "guilty of the crime and unlawfully having in his possession intoxicating liquor, included within said charge of unlawfully manufacturing intoxicating liquor in violation of the Wright Act as charged in the Information"; pursuant to which verdict judgment of conviction was pronounced by the lower court. In reversing the lower court, the appellate court held that the verdict was not responsive to the offense charged in the Information; that the verdict of the jury and the judgment of the lower court were mere nullities; that *there could be no retrial of the issue attempted to be decided by such verdict and judgment;* and that if an attempt were made to try the defendant a second time, his plea of having been once in jeopardy for the same offense should be sustained.

In *State* v. *Yow,* 227 N.C. 585, 42 S.E. (2d) 661, defendant was indicted for "larceny of a pistol"; there was a second count charging defendant "with receiving the stolen pistol knowing it to have been stolen." The jury returned a verdict "guilty of receiving stolen goods." Upon that verdict, judgment was rendered imposing sentence. In reversing the lower court, the Supreme Court of North Carolina held that the *failure of the jury to find the defendant guilty of larceny amounted to an acquittal on that charge* and that the verdict "guilty of receiving stolen goods" was insufficient to support the judgment on the second count.

In *State* v. *Ward,* 147 La. 1083, 86 So. 552, defendant was charged with burglary in the nighttime; the jury found him guilty of "burglary in the daytime"; the appellate court held that the verdict was not responsive

to the charge and set aside the judgment and sentence and *ordered the defendant discharged.*

In the case at bar, since "there was no verdict of guilty of false labeling within the charge of the information", and since the petitioner "was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges" (as stated in the Opinion of the Court of Appeals filed herein on April 18, 1949: R.pp. 459-460), and since the effect of such discharge of the jury "is equivalent to acquittal" and since "any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent" (as stated by this court in the *Selvester* case, *supra*), the petitioner should have been discharged in accordance with the original Opinion of the Court of Appeals filed on April 18, 1949. At the very least, under the rule of this court in the *Buzzo* case, *supra*, the Court of Appeals should have reversed and remanded this case with directions to the trial court to set aside the judgment *and dismiss the case.*

Since it is clear that petitioner "was put in jeopardy on the charges of the several counts of the information" and that "any further attempt to prosecute would amount to a second jeopardy", petitioner should not be subjected to the burden and expense of another trial, and perhaps of another appeal to the Court of Appeals, in order to establish his defense of former jeopardy.

Petitioner has not waived his defense of former jeopardy.

As stated by the trial court (R.p. 372) in its order denying defendant's motion for judgment of acquittal, petitioner withdrew his motion for new trial. Petitioner's counsel withdrew the motion for new trial because petitioner did not want a new trial and because his counsel believed that he was entitled to judgment of acquittal.

At no time in the Court of Appeals did petitioner ask for a new trial.

Under the heading "Relief Prayed For" on page 16 of petitioner's brief, filed in the Court of Appeals on or about December 24, 1948, petitioner said:

> "On this appeal, appellant prays for reversal of the judgment of the lower court as to Counts I and III of the Information; and that appellant be granted judgment of acquittal, or that the action be dismissed in accordance with appellant's motion filed December 18, 1947 (R. 6, 7), and that he be discharged." (R.p. 499);

and petitioner concluded his brief as follows:

> "For the reasons above stated, it is respectfully submitted that the judgment of the lower court should be reversed; that the defendant is entitled to judgment of acquittal or to have the action dismissed in accordance with his motion for dismissal which was denied by the lower court and, in either event, that the defendant is entitled to be discharged."
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> "In taking this appeal, the defendant does not waive and expressly reserves his right to not again be tried or put in jeopardy on or for any of the charges on which he was once tried and found 'not guilty' by the jury or on which the verdicts of the jury were silent." (R.p. 499).

In the light of these circumstances, it is clear that petitioner never waived his defense of former jeopardy.

The fundamental violation of the *double jeopardy* provision of the Fifth Amendment of the Constitution by the appellate court's modifying Order (R.p. 489) of June 6, 1949, and the conflict between such modifying Order and this Court's above-cited decisions, and the appellate court's departure from the usual and accepted course of judicial proceedings (by directing a new trial instead of discharging defendant), is further emphasized by the fact that the Court of Appeals directed the granting of a new trial on two Counts on which the jury's

verdict found defendant *"not guilty" three times* (i. e. "not guilty" twice as to Count I and "not guilty" once as to Count III).

Thus, not only was there an implied acquittal as to each of these two Counts by reason of the fact that the jury was discharged after full trial on a valid information, without having found defendant guilty of any offense charged in the information, but, indeed, the returned verdicts found defendant *"not guilty" three times* on two counts as to which the appellate court's erroneous modifying Order (R.p. 489) of June 6, 1949 directs the granting of a new trial not sought by either party.

Thus, even without regard to the implied acquittal, how can defendant be re-tried on Counts I and III in view of the fact that the jury found defendant *"not guilty" three times* on these two counts?

In conclusion, it is therefore respectfully submitted that the modifying order entered by the Court of Appeals on June 6, 1949 is a violation of the double jeopardy provision of the Fifth Amendment of the Constitution of the United States in conflict with the above-cited decisions of this and other courts and so far departs from the usual and accepted course of judicial proceedings, as shown by the above-cited and quoted decisions, as to justify this Court's exercise of its power of supervision and the grant of writ of certiorari.

Argument of Point 2:

Attorney's Affidavit, in conflict with the Record, as to alleged facts *de hors* the record, not proper basis for appellate court's modifying Order of June 6, 1949

The facts relative to this point are summarized on pages 10, 11 and 12 (R.pp. 500-2) of petitioner's Petition for Re-Hearing, filed in the Court of Appeals on July 5, 1949, to which reference is hereby made.

The burden of the government attorney's Affidavit of May 18, 1949 (R.pp. 487-8) filed in the Court of Appeals on May 23, 1949 in support of the government's Petition for Re-Argument (R.pp. 461-486) was that it was defend-

ant's attorneys who misled the District Court into submitting to the jury the multiple forms of verdicts under which the jury found the defendant "not guilty" *five times* (and found the defendant "guilty" twice, but *only* of an offense *not* charged in the Information).

The government attorney's "Affidavit for Correction of Record" (R.p. 487) concedes that the matters alleged in the Affidavit for proposed "correction" of the Record, are *not* found either in the printed or typewritten Transcript of Record on appeal nor in the original typewritten Transcript in the District Court, nor in the court reporter's stenographic notes.

What is more, however, is that the printed Record on appeal clearly shows that it was the government's attorney who suggested to the trial judge the verdict-forms adopted by the trial court (R.pp. 274-276).

Thus, on March 19, 1948 (seven days before the case was submitted to the jury) the following colloquy took place between the trial judge and the government's attorney:

> "THE COURT:—How would you reflect that in the verdict?
>
> "MR. HANSEN:—Well, I imagine that the only way it could be reflected in the verdict would be by interrogatories to the jury itself, and if the jury found with respect to count 1 that there has been a false statement or that the proper name has not been used or that the directions were inadequate, they should find and return a verdict of guilty. Now that might be based on all three of them and I feel that you wouldn't have any way of knowing that excepting as you might interrogate the jury by way of interrogatories.' (R.pp. 275-6).

Thus, there is no doubt, on the Record as filed in the Court of Appeals, that it was the government's attorney who suggested the multiple forms of verdicts, in the nature of interrogatories, rather than the usual form of general verdict, namely, verdicts on which the jury is

required and permitted to find the defendant "guilty" or "not guilty" *only once* as to each count. Likewise, there is no doubt, on the Record, that defendant's attorneys took timely exception to the multiple forms of verdicts (R.p. 350).

Rule 39(b)(1) of the Federal Rules of Criminal Procedure provides:

> "The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules."

Rule 75(h) of the Federal Rules of Civil Procedure, provides, inter alia:

> "If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the Clerk of the district Court."

Rule 36 of the Federal Rules of Criminal Procedure provides:

> "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after notice, if any, as the court orders.

The record in the Court of Appeals was prepared and filed in accordance with the Rules above cited.

Federal Rules of Procedure have the force of Statute, as stated in *John R. Alley & Co.* v. *Federal National Bank*, 124 F. 2d 995, 998 (CCA 10):

> "The new rules have the force and effect of statutes. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479."

To the same effect is

Nash v. *Raun*, 67 F. Supp. 212, 217 (DC WD Pa.).

In *Dreslin* v. *Phillips*, 279 Fed. 303 (App. D.C.), the appellate court sustained the trial court's refusal to grant a verified "petition to correct record" (to change the date of entry of judgment), stating:

> "It is familiar law that a record imports absolute verity, which an affidavit by a party does not, and hence that, when a court supposed to have personal knowledge of the facts sustains the recital in a record as against the recital in an affidavit, its ruling will not be disturbed on appeal. Johnson *v.* U. S., 38 App. D.C. 347, 255 U.S. 405, 32 Sup. Ct. 748, 56 L.Ed. 1142; Col. Heights Realty Co. *v.* MacFarland, 31 App. D.C. 112."

To like effect are *Clawans* v. *White*, 112 F.2d 189 (App. D.C.) and *Century Indemnity Co.* v. *Arnold*, 153 F.2d 531 (CCA-2).

In the Commentary "Settlement of Record on Appeal", 5 Fed. Rules Serv., 75 h.2, pp. 850-1, it is stated:

> "Rule 75(h) provides that any dispute as to the correctness of the record must be settled by the district court. Presumably if the record has already been sent to the appellate court it would be necessary to move that court to remand the record to the district court."

> "If a timely motion to correct the record is not made the record is presumably conclusive on the parties." (Citing *Dreslin* v. *Phillips*, supra).

In the case of *Petitions of Rudder,* 159 F.2d 695, 696 (CCA-2), the Court refused to consider matters not included in the record on appeal, as certified by the Clerk, where no attempt was made to have the record settled by the district judge and the material was not omitted by error or accident.

In *Boucher Inventions, Ltd.* v. *Sola Electric Co.,* 1 F.R.D. 631 (D.C., D. of C.), it was held that a dispute as to the correctness of an unofficial reporter's transcript may be settled by the trial judge.

In *Heath* v. *Helmick,* 173 F.2d 156 (CA-9, decided Mar. 4, 1949), the Court, in refusing to consider a supplemental or additional record, involving documents not considered by the District Court, stated:

> "The cause must be tried here upon the record made at the original trial."

Moore's Federal Practice, Vol. 3, § 75.09 (page 385 of 1948 Supplement) states:

> "While the record may thus be corrected, even after transmission to the appellate court, it will be conclusive on the parties in the absence of a *timely* request for a correction thereof."*
>
> "Moreover, objections to the effect that the record was not prepared in accordance with the applicable Federal Rule may be dismissed where such objections are not presented promptly for the appellate court's consideration."

In *Wertz* v. *National City Bank,* 115 F.2d 65, 67 (CCA-7), the Court held to be untimely, appellee's objections to the correctness of the record which were presented for the first time in Appellee's Brief on the merits.

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* citing *Marvin's Credit, Inc.* v. *Hall,* 129 F. 2d 57 (App. D. C.) wherein it was held:

> "Where, as here, there are, for example, no inconsistencies within the transcript of record, no apparent inadequacy of the transcript, no clerical or ministerial mistake, and no charge of deliberate falsification, there cannot be the slightest doubt that we, an appellate court, must accept the transcript of record as it comes to us."

It is, therefore, respectfully submitted that under the rules and authorities the "Affidavit for Correction of Record" (R.pp. 487-8) filed in the Court of Appeals by the government's attorney on May 23, 1949 in support of the government's Petition for Re-Argument (R.pp. 461-486) was not a proper basis for the appellate court's modifying Order and final Judgment (R.p. 489) of June 6, 1949, particularly in view of the fact that petitioner was given no opportunity to respond to the government's Petition for Re-Argument or to the "Affidavit for Correction of Record", and has not had his day in court in respect to the modifying Order (R.p. 489) of June 6, 1949.

While the *due process* provisions of the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States do not, in and of themselves, require that a right of appeal shall exist (*District of Columbia* v. *Clawans,* 303 U.S. 617, 627; 81 L.Ed. 843, 847), yet as stated in *Boykin* v. *Huff,* 121 F. 2d 865, 872 (App. D.C.):

> "While due process under the Fifth Amendment, as under the Fourteenth, does not require appellate review, nevertheless when Congress creates that right it is not free from all constitutional restrictions, including the obligation not to make unreasonable discriminations."

To like effect is *Frank* v. *Mangum,* 237 U.S. 309, 327, wherein this Court stated:

> "But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the state of Georgia (as will appear from decisions elsewhere cited) provide for an appeal in criminal cases to the supreme court of that state upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases (citing cases), it is perfectly obvious that where such an ap-

peal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

To like effect is the decision of this Court in *Saunders* v. *Shaw*, 244 U. S. 317.

As stated in *United States* v. *Henson*, 21 F. Supp. 616, 618 (DC ED Pa. Maris, J.):

"The due process of law to which the Fourteenth Amendment refers is not confined to the proceedings and judgment of the trial court. It includes also proceedings on appeal in the state court."

Conclusion.

Petitioner therefore respectfully submits that for each of the reasons relied on for allowance of the writ of certiorari, as set out on pages 11 and 12 of the foregoing Petition, this case is one in which a writ of certiorari should be granted.

Respectfully submitted,

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